

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAULA BAILEY,

Defendant-Appellant.

UNPUBLISHED

October 3, 2000

No. 214348

Wayne Circuit Court

Criminal Division

LC No. 96-008523

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of second-degree murder, MCL 750.317; MSA 28.549, and seven counts of assault with intent to commit murder, MCL 750.83; MSA 28.278. The trial court sentenced defendant to concurrent prison terms of thirty to fifty years each for the second-degree murder convictions and five to ten years each for the assault convictions. Defendant appeals as of right. We affirm.

This case arises out of the burning of a private residence in the City of Detroit, in October 1996. At defendant's instigation, codefendant Eugene McKinney and codefendant Todd Daniels intentionally set fire to a house in which defendant's ex-boyfriend and several others lived. Three children were killed in the fire. Seven others, three adults and four other children, escaped from the fire by jumping from a second-story window.

I

Defendant first argues that the trial court erred in its instructions to the jury. Defendant waived review of the jury instructions by failing to object at trial. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). This Court reviews unpreserved claims of constitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). A "reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 774.

Defendant claims that the trial court erred in failing to instruct the jury on her theory of the case. Defendant asserts that it was her sole defense “that she had engaged others to beat up on her ex-boyfriend and that she never contemplated the burning of the premises in question.” However, defendant did not request that her theory of the case be read to the jury. A trial court is not required to present an instruction of the defendant’s theory to the jury unless the defendant makes such a request. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Furthermore, there is no manifest injustice in this case because, as defendant admits, her theory of the case was repeatedly stated to the jury during closing arguments. Because the jury was fully aware of defendant’s theory of the case, defendant was not prejudiced by defense counsel’s failure to request an instruction on her theory of the case. Therefore, defendant’s claim of ineffective assistance of counsel in this regard must also fail. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Next, defendant argues that the trial court erred in failing to inform the jury on the possible verdicts that could be returned under each charge and in failing to make reference to a jury verdict form. We have reviewed the jury instructions in this case and find that the jury was instructed that it may find defendant guilty as charged, guilty of lesser included offenses, or not guilty. Moreover, defendant did not request that the jury be instructed that it could refuse to return a verdict, nor does she provide any authority on appeal to indicate that a jury must be instructed that it could refuse to reach a verdict and be a “hung jury.” Furthermore, the record indicates that a jury verdict form was given to the jury for use during deliberations.

Defendant next claims that the trial court erred in failing to instruct the jury on the cognate lesser included offense of involuntary manslaughter.¹ Because defendant failed to request an instruction on involuntary manslaughter, the trial court did not err in failing to give such an instruction. See *People v Kuchar*, 225 Mich App 74, 77; 569 NW2d 920 (1997). In any event, we find no manifest injustice in this case because the evidence did not support an instruction on involuntary manslaughter. See *People v Cheeks*, 216 Mich App 470, 479-480; 549 NW2d 584 (1996); *People v Booker (After Remand)*, 208 Mich App 163, 170; 527 NW2d 42 (1994).

Lastly, we have reviewed the trial court’s instructions regarding aiding and abetting. The instructions, which were not objected to by defendant, are neither confusing nor misleading and do not result in manifest injustice to defendant. See *People v King*, 210 Mich App 425, 428-429; 534 NW2d 534 (1995).

II

Defendant next contends that she was denied a fair trial by allegedly improper conduct on the part of the prosecutor. As she admits, however, defendant did not object at trial to the comments of which she now complains. To preserve for appeal an argument that the prosecutor committed

¹ It is unclear whether defendant also contends that the trial court erred in denying her request to instruct the jury on voluntary manslaughter. However, the record does not contain evidence of provocation or passion sufficient to mitigate second-degree murder to voluntary manslaughter. See *People v Moore*, 189 Mich App 315, 320; 472 NW2d 1 (1991).

misconduct during trial, a defendant must object to the conduct at trial on the same ground as she asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant argues that the prosecutor improperly expressed personal knowledge of defendant's guilt during closing argument. A prosecutor may argue the credibility of the witnesses and the guilt of the defendant, but may not support the argument with the authority or prestige of the prosecutor's office or the prosecutor's personal knowledge. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Notwithstanding the prosecutor's unfortunate reference to the sincerity of his belief, the import of his argument was that he believed the evidence presented established defendant's guilt. A prosecutor is free to argue the evidence and all reasonable inferences from the evidence as they relate to the prosecution's theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Because the prosecutor's statement was not improper, defendant was not denied the effective assistance of counsel by her counsel's failure to object to the statement. See *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

III

Next, we reject defendant's claim that her written statement was inadmissible hearsay and, therefore, improperly admitted at trial. Defendant's own statement was offered against her at trial. Therefore, her statement was admissible under the admission by a party exception to the hearsay rule. See MRE 801(d)(2), see also *People v Jensen*, 222 Mich App 575, 580-581; 564 NW2d 192, vacated in part on other grounds 456 Mich 935 (1997). With regard to defendant's claim that her written statement was inadmissible because it was not signed by her, there is no requirement under MRE 801(d)(2) that a statement be signed in order to be admissible and defendant has failed to provide this Court with any authority to support her claim otherwise.

We further reject defendant's claim of error arising from the court reporter's failure to record the sidebar conference during which the parties discussed this issue with the court. While it is preferred that all sidebar discussion be on the record or later memorialized on the record, MCR 8.108, the court rule prescribing the duties of court reporters, does not require a court reporter to take a verbatim record of sidebar conferences. In any event, in light of our holding that the statement was properly admitted, defendant has failed to indicate how she was prejudiced by the court reporter's failure to record the sidebar conference.

IV

Lastly, defendant claims that the trial court abused its discretion in determining that she was competent to stand trial. The determination of a defendant's competence to stand trial is within the trial court's discretion and will be reversed only where the court's decision constitutes an abuse of discretion. See *People v Newton (After Remand)*, 179 Mich App 484, 488; 446 NW2d 487 (1989). A criminal defendant is presumed competent to stand trial absent a showing that "he is incapable because of his mental condition of understanding the nature and object of the proceedings

against him or of assisting in his defense in a rational manner.” MCL 330.2020(1); MSA 14.800(1020)(1); see also *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). An incompetent defendant “shall not be proceeded against while he is incompetent.” MCL 330.2022(1); MSA 14.800(1022)(1); *Harris, supra*. The issue of a defendant’s competence to stand trial may be raised by either party or the court. MCL 330.2024; MSA 14.800(1024); *Harris, supra*.

After carefully reviewing the testimony presented at the competency hearing, we are not persuaded that the trial court abused its discretion in finding defendant competent to stand trial. Although the evidence indicated that defendant was taking anti-depressant and anti-psychotic medication at the time of trial, there was evidence that defendant was oriented to her surroundings and understood the nature of the proceedings against her. There was also evidence that defendant was capable of assisting in her defense in a rational manner. Therefore, the trial court did not abuse its discretion in determining that defendant was competent to stand trial. See *Harris, supra*.

Defendant also claims that at the time of trial the medication she was taking prevented her from understanding the proceedings and assisting her counsel. However, defendant was found competent on October 8, 1997, and we have determined that that finding was supported by the evidence presented at the competency hearing. Defendant has provided no indication that anything changed between the date of the competency hearing and trial, which commenced three weeks later, that would have rendered her incompetent at the time of trial.

In light of our holding that the trial court did not err in finding defendant competent to stand trial, we reject defendant’s claim that she was denied the effective assistance of counsel by her counsel’s failure to raise the issue of defendant’s competency at trial. See *Meadows, supra*.

Affirmed._

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White